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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Adoption of NATALIE L., a Minor.

MISTY L.,

Plaintiff and Respondent,

v.

RICHARD S.,

Defendant and Appellant.

D042008

(Super. Ct. No. JA49747)

APPEAL from a judgment of the Superior Court of San Diego County, Cynthia Bashant, Judge. Affirmed.

Father Richard S. appeals an order of the San Diego County Superior Court granting mother Misty L.'s petition to declare their minor child Natalie L. free of his custody and control. We affirm.

BACKGROUND

Misty and Richard were married in Seattle, Washington, on August 16, 1987. When they separated on April 1, 1988, Misty was pregnant with Natalie. Natalie was born December 5, 1988. By a judicial decree entered in Clark County District Court, Nevada, on January 24, 1989, Misty and Richard were divorced. The court retained jurisdiction to determine Natalie's paternity.

Misty moved to Coronado, California, where on April 14, 1989, she obtained a domestic violence restraining order against Richard. In July 1989 Richard filed an order to show cause in the San Diego County Superior Court in which he sought custody and visitation. On November 2, 1989, by ex parte order, he was granted joint legal custody with visitation. Misty and Richard were restrained from removing Natalie from San Diego County until November 8, 1992.

On November 12, 1989, Richard violated the restraining order of April 14, 1989. He was arrested, charged and apparently later pleaded guilty to trespass, a violation of Penal Code section 602.

On December 30, 1989, Misty married Steve L.

In addition to the charges stemming from violation of the restraining order, on February 15, 1990, the record reflects Richard was charged with four criminal counts stemming from domestic violence against Misty. These charges were apparently based upon events occurring on April 3, 1989, and November 6, 1989. Three of the counts alleged misdemeanor battery in violation of Penal Code section 242/243, subdivision (a), and one count alleged felony spousal abuse in violation of Penal Code section 273.5.

On February 26, 1990, Richard was to be arraigned on the February 15, 1990, domestic violence charges. He did not appear. A warrant issued for his arrest on April 24, 1990.

The order to show cause brought by Richard in July 1989 was scheduled for trial on June 15, 1990. Richard did not appear. He was, however, represented by counsel. Following the hearing, on July 9, 1990, the court modified its ex parte order of November 8, 1989, which granted Richard joint legal custody. Under the new order, Misty was granted sole legal and physical custody of Natalie. The order was made without prejudice to Richard recalendaring a hearing.

In 1995 the outstanding criminal charges were purged, Richard never having appeared in the matters.

On September 18, 2002, Richard filed a motion in Clark County District Court in Nevada, requesting that court set child support for Natalie pursuant to Nevada law. Misty responded to the Nevada motion by asking for child support arrearages for a 12-year period. The Nevada court set child support at \$600 per month, requiring the sum be paid to Misty. If Misty did not accept the money, Richard was ordered to deposit the sum each month in an interest bearing account. Because Misty did not request an evidentiary hearing on Richard's allegation that she hid Natalie from Richard, the court found she was estopped from obtaining arrearages in child support. It left open the opportunity for her to request such an evidentiary hearing if she wished to refute Richard's allegation she hid Natalie and thereby establish a basis for arrearages.

On October 2, 2002, Richard filed an order to show cause for a modification of custody and visitation in San Diego County Superior Court. Misty filed a petition to declare Natalie free from parental custody and control pursuant to Family Code section 7822. Misty then moved for Natalie's adoption by Steve.

On March 14, 2003, the court declared Natalie free from the custody and control of Richard and ruled his consent would not be necessary for the petition for adoption to go forward.

Richard filed a timely appeal.

DISCUSSION

I

Richard argues there is insufficient evidence he intended to abandon Natalie. Family Code section 7822, subdivision (a), provides a proceeding to terminate parental rights may be brought "where the child has been left . . . by one parent in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child." The failure to provide support or to communicate with the child is presumptive evidence of the intent to abandon, and token efforts to communicate or support the child are not sufficient to overcome the presumption of abandonment. (Fam. Code, § 7822, subd. (b).)

At trial, Misty and Richard agreed that Richard had no contact with Natalie between November 6, 1989, and June 2002. At the conclusion of the hearing below, the court found by clear and convincing evidence that for a period of the 12 months

following November 1999 Richard intended to abandon Natalie. Richard challenges the sufficiency of this finding. We affirm the court's ruling.

As the parties note, findings under Family Code section 7822 must be supported by clear and convincing evidence. (§ 7821.) Clear and convincing evidence requires a finding of high probability. That is, evidence must be so clear as to leave no substantial doubt and must be sufficiently strong so as to command unhesitating assent of every reasonable mind. (*In re David C.* (1984) 152 Cal.App.3d 1189, 1208.) Questions of intent and abandonment are factual issues governed on appeal by the substantial evidence test. (See *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1315.) In applying this test, we may not reweigh the evidence or express our independent judgment. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Rather, the evidence must be viewed on appeal in the light most favorable to the trial court's order and we must draw all reasonable inferences and resolve all conflicts in favor of the prevailing party. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.)

Here, Richard brought an order to show cause in the San Diego County Superior Court, seeking to define his rights as to custody and visitation with Natalie. The matter was heard on July 9, 1990. Richard, apparently having left California, did not personally appear but was represented by counsel. There were, at the time criminal charges pending against Richard arising out of then-recent allegations of multiple assaults on Misty, criminal charges for which an arrest warrant had issued and for which he had failed to appear. At the conclusion of the hearing the court awarded Misty sole legal and physical

control of Natalie. There was no visitation order or support order. However, the orders were made without prejudice to Richard recalendaring the matter. He did not do so.

In 1995 the criminal charges were expunged, Richard never having answered on them. The first affirmative step taken by Richard to secure his legal rights with respect to Natalie occurred in September 2002 with the filing of a motion in Nevada seeking to set child support. It was followed several weeks later by his filing an order to show cause for modification of custody and visitation in the San Diego County Superior Court. Richard's explanation as to why, for approximately 12 years, he did not seek legal recourse to find Natalie through the court system, child search systems or seek a judicial declaration of his rights and responsibilities was chiefly that he did not think Misty was in California and he thought he needed to find her before the court orders could be changed.

Richard points out that between the end of 1990 and beginning of 2002 his attempts were directed to finding *Misty*. For this he sought help from his brothers and several others outside the legal system. However, such extrajudicial efforts are insufficient. (See *In re Marraige of Comer* (1996) 14 Cal.4th 504, 530-531; also see *In re Maxwell* (1953) 117 Cal.App.2d 156,165-166.) Moreover, while the trial court acknowledged he might have made some attempt to contact Misty's relatives, it concluded these attempts were not directed to finding Natalie, but rather were attempts directed at Misty herself. While Richard stated that between December 1989 and February 1990 he sent gifts to Natalie, Misty testified she did not receive such alleged gifts.

Richard's argument on appeal that he could not have abandoned Natalie because the court proceeding in 1990 removed custody from him is unavailing. The order to show cause proceeding which took that action was one sought by Richard himself. With criminal charges pending against him, he voluntarily chose not to appear in court. The order entered by the court expressly invited him to return to court and secure a different ruling. He did not do so. On these facts, Richard's reliance on *In re Cattalini* (1946) 72 Cal.App.2d 662 is misplaced. *Cattalini* holds a custody order favoring one parent does not provide the basis for concluding the other parent has "left" a child. Rather, voluntary action by the parent beyond such an order must be shown. While Richard would seek to carve the facts of this case into those of *Cattalini*, in reality this case differs in important respects. Here, Richard was invited to return to court and change the order made in Misty's favor. It is his disappearance and failure to avail himself of that remedy, i.e., to eliminate the order itself, which forms a substantial basis for the conclusion he did not wish to have a relationship, or communicate, with Natalie.

On this record the court could conclude by clear and convincing evidence that any attempts by Richard to locate, communicate and reestablish custody and visitation with *Natalie* were token efforts. Substantial evidence supports the trial court's order.

II

On February 21, 2003, Richard moved to dismiss Misty's petition to declare Natalie free of his custody and control. He based his motion on the ground a Nevada court had already set child support and in the process ruled Misty concealed Natalie, thus denying her request for arrearages in child support. The court ruled the Nevada actions

were not res judicata because (1) the Nevada court made only a preliminary finding on the issue of concealment, allowing Misty to request an evidentiary hearing on the matter and (2) California was and is the appropriate forum for rulings with respect to Natalie.

We begin with the propriety of the Nevada order for Natalie's support.

Nevada Revised Statutes section 130.204 provides a tribunal in Nevada may exercise its jurisdiction to establish a support order even after a comparable support order has been filed in another state. However, it will do so only where the time has not yet expired in the other state for challenging that other state's jurisdiction and the party seeking the Nevada relief has in fact challenged the other state's jurisdiction. Moreover, where relevant, Nevada will not assume jurisdiction where it is not the home state of the child involved. California is guided by the same principles. (Fam. Code, § 4908.)

Based upon these statutes, the Superior Court of San Diego County, California, not Nevada, is the appropriate forum for resolving issues of Natalie's custody and support. While Misty and Richard were divorced in Nevada, Natalie was born in San Diego, resided in San Diego most of her life and was a resident of San Diego when all custody and child support orders were entered. Indeed, in 1989 Richard filed an order to show cause petition in the San Diego County Superior Court seeking custody and child support orders for Natalie. The court ruled on this motion, giving Misty sole physical and legal custody of Natalie and setting no child support or visitation. Richard was given the opportunity to return to court and modify these orders, which he did not do. Both Nevada and California law preclude his bringing a motion to set child support in Nevada

when the support issue had been for some time a matter decided by, and was a continuing matter before, the San Diego County Superior Court.

The trial court correctly found the Nevada court ruling did not affect its ability to rule on matters of Natalie's custody and support. In light of these conclusions, we need not decide if the Nevada court issued a ruling on the merits with respect to whether Richard's support obligations were impacted by Misty's alleged concealment of Natalie.

The judgment below declaring Natalie free of Richard's custody and control is affirmed. Costs on appeal are awarded to Misty.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

McDONALD, J.